79-864

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

DON H. PERRY
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
No. CR-78-1645

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TABLE OF CONTENTS

Subject Index

I. Opinions Delivered in Courts Below 2

II. Jurisdictional Statement 2

III. onstitutional Provisions, Statutes and Rules Invoked 2

IV. Question Presented 2

V. Statement of the Case 3

VI. Reason for Granting the Writ .....

A. THE SUPREME COURT SHOULD ISSUE A WRIT OF CERTIORARI IN THIS CASE BECAUSE THE TENTH CIRCUIT COURT OF APPEALS' HOLDING IN THIS CASE IS CONTRARY TO THE SUPREME COURT HOLDING IN THE ANALOGOUS CASE OF *DRAPER v. WASHINGTON*, 372 U.S. 487 (1963) AND BECAUSE THE SUPREME COURT HAS NEVER PREVIOUSLY PRESENTED CONSTITUTIONAL GUIDELINES BY WHICH TO DETERMINE THE CONSTITUTIONALITY OF THE APPLICATION OF F.R.A.P., RULE 10(c) 6

B. THE SUPREME COURT SHOULD CLARIFY THE CONFUSION IN THE CIRCUITS CONCERNING SCIENTER, KNOWLEDGE, INTENT, AND WILLFULNESS THAT EXISTS IN CONSTRUING THE CULPABILITY NEEDED TO CONVICT A CITIZEN FOR FAILING TO SUPPLY TAX INFORMATION CONTRARY TO 26 U.S.C. §7203 10

C. A CITIZEN SHOULD BE ENTITLED TO RELY UPON HIS RIGHTS UNDER THE 5TH AMENDMENT WITHOUT HAVING TO BE OR PROFESS TO BE A CRIMINAL 12

Conclusion 13

APPENDIX

A. *U.S. v. Perry* 14-27

B. Constitution of the United States 27

26 USC §7203 28

Rule 10(c) F.R.A.P. 28

CASES CITED

Bishop v. U.S. 412 U.S. 346 (1972) 11

Coppedge v. U.S. 369 U.S. 438 9,18

Draper v. Washington 372 U.S. 487 6,7,9,10,18,19

Garner v. U.S. 424 U.S. 648 12,13,15

Pauldino v. U.S. 500 F.2d 1369 13

Miranda v. Arizona 384 U.S. 436 10,13

U.S. v. Addington 471 F.2d 560 21

U.S. v. Dillon 566 F.2d 702 11

U.S. v. Goldsmith 272 F.Supp. 924 13

U.S. v. Grismore 546 F.2d 844 21

U.S. v. Irwin 561 F.198 13

U.S. v. Malnick 348 F.Supp. 1723 13

U.S. v. McCorckle 511 F.2d 482 11

U.S. v. Murdock 290 U.S. 389 ..... 10, 11

U.S. v. Pohlman 522 F.2d 974 11

U.S. v. Pomponio 429 U.S. 10 10

U.S. v. Sullivan 13,15

U.S. v. Vitiello 363 F.2d 240 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
No. CR-78-1645

Petitioner, Don H. Perry, by his attorney, prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth (10th) Circuit entered on October 1, 1979, with mandate stayed pending Certiorari.

I.
OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, which is attached hereto as Appendix A, was filed on the 1st day of October, 1979, with mandate stayed pending Certiorari.

II.
JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

III.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and statutory provisions are set forth in Appendix B.

IV.
QUESTIONS PRESENTED

1. Has the Court of Appeals denied the Defendant a meaningful appeal and thus denied him due process of law as guaranteed by the Fifth Amendment of the U.S. Constitution when it ruled on the Defendant's appeal issues without a transcript of over one-half of the Defendant's trial?

2. What is the correct scienter, knowledge, intent, and willfulness needed for the culpability to convict a citizen for failing to supply tax information contrary to 26 U.S.C. §7203?

3. Does a person have to be a criminal or wrongdoer in order to fall under the purview of the Fifth Amendment of the U.S. Constitution?

V.
STATEMENT OF THE CASE

Information charging Mr. Don H. Perry with willfully failing to supply necessary information on his 1974, 1975, and 1976 1040 Income Tax Return forms, contrary to 26 U.S.C. 7203, was filed on March 13, 1978. He was convicted June 1, 1978, on all three counts and was sentenced to three concurrent one year sentences with one year to be suspended if the Defendant were to perform 320 hours of work for the government. Prior to his trial on May 30, 1978, the Court denied the following motions filed on behalf of the Defendant: Motion to Dismiss Due to Lack of Jurisdiction; Motion to Grant the Defendant Immunity; Motion to Dismiss Due to Prosecutorial Misconduct; Motion for Change of Venue Due to Prejudicial Publicity; Motion for Continuance Due to Prejudicial Publicity; Motion to Dismiss Due to Prejudicial Publicity; and Motion to Permit Counsel for Defendant to Perform Voir Dire Questioning.

Evidence at a two day trial showed that for the three years in question, the Defendant had filed 1040 Income Tax Return forms supplying his name, his wife's name and a few other items of information. However, he declined to answer other questions such as the amount of income he had earned, claiming his right as a United States citizen to Fifth Amendment guarantees, attaching various pieces of literature and court decisions which supported his position.

Mr. Perry testified that he had objected to certain questions on his 1974, 1975 and 1976 Income Tax Return forms because he felt that the requirement that he supply this information violated his First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Sixteenth Amendment rights. The Defendant's main contentions were that this violated his First Amendment right to freedom of religion, since his faith, the Mormon Church, requires him to uphold the Constitution as the Supreme Law of the Land, and that this violated his Fifth Amendment right, which denies the government the right to compel a person to testify against himself.

At trial, the Court refused to permit testimony as to the Defendant's belief that his First Amendment rights had been violated by the requirement that he supply this information, ruling that the First Amendment was no defense to the charge.

Throughout the trial and in instructing the jury at the close of the trial, the Court stated that a person could not claim any right under any of the Amendments other than the Fifth Amendment. Furthermore, the Court stated that the Fifth Amendment privilege would only apply in those cases where a person could show that he or she had received income from illegal sources or believed that he or she had received income from illegal sources. The Defendant did not do this.

The Court refused to give all but one of the Defendant's proposed instructions. Among those instructions denied were the Defendant's instructions with regard to *ex post facto* laws, the equal inference rule, and all instructions tendered by the Defendant which dealt with the Defendant's Fifth Amendment right, the definition of good faith, and the definition of willfulness.

The Defendant filed a timely appeal and made a timely request and $1,100.00 deposit to the U.S. District Court reporter for a transcript of the entire trial. In response to the reporter's request for a deposit, the Defendant paid the reporter $1,100.00.

Approximately five months after the conclusion of the trial, the reporter who had worked for the District Court reporter supplied the Defendant with a transcript of the second day of testimony only and the return of verdict on the third day of the trial.

The Defendant continued to make repeated requests for a transcript of the missing portion of the trial, which included the choosing of the jury, the first day of testimony, closing arguments, motions on jury instructions and the jury instructions. After several hearings, it was determined by the District Court that the transcript notes for those portions of the trial had been

lost, and that it would be impossible for the reporter to supply the Defendant with the transcript for these one and a half days of trial.

The Defendant then followed Federal Rules of Appellate Procedure, Rule 10(c), which provides the proper procedure to be followed when a transcript of a court proceeding is unavailable, attempting to prepare a statement of the evidence. Because this process was attempted nine months after the trial had been held, the Defendant and his counsel found it nearly impossible to reconstruct the relevant events which occurred at trial. Each of these three participants had different recollections of what had occurred at the trial, and none of them could remember protions of what occurred at trial. Therefore, the Defendant and his two counsel each wrote a statement of their recollections of the evidence.

The government took no action and presented no statement of the U.S. Attorney's recollection of what happened at trial.

On April 20, 1979, the U.S. District Court, the Honorable Judge Matsch presiding, held a hearing to determine what records should be transmitted to the Court of Appeals. The Court stated that it could make no additions to the statements because the Court could not remember what had occurred at a trial which took place 11 months before that hearing. The Court stated that it could add nothing to the statement and, due to its lack of recollection of the trial, it was simply forwarding the defense statements of evidence to the Court of Appeals. The District Court entered no order with specific findings of fact as to what happened at the unreported portions of the trial.

After this hearing, counsel for the Defendant attempted to write the Defendant's opening brief. However, without the transcript for one and a half days of trial, counsel discovered that it was impossible to address several issues which were imperative for the Defendant's appeal.

The Defendant submitted to the Court of Appeals a Motion to Remand this matter and a Motion for Reconsideration of Appellant's Motion to Remand this matter to the District Court so that the District Court could determine whether or not the record as it then stood was sufficient to protect the Defendant's rights on appeal. Both of these motions were denied by the Tenth Circuit Court of Appeals.

VI.
REASON FOR GRANTING THE WRIT

A. THE SUPREME COURT SHOULD ISSUE A WRIT OF CERTIORARI IN THIS CASE BECAUSE THE TENTH CIRCUIT COURT OF APPEALS' HOLDING IN THIS CASE IS CONTRARY TO THE SUPREME COURT HOLDING IN THE ANALOGOUS CASE OF *DRAPER v. WASHINGTON*, 372 U.S. 487 (1963) AND BECAUSE THE SUPREME COURT HAS NEVER PREVIOUSLY PRESENTED CONSTITUTIONAL GUIDELINES BY WHICH TO DETERMINE THE CONSTITUTIONALITY OF THE APPLICATION OF F.R.A.P., RULE 10(c).

Federal Rules of Appellate Procedure, Rule 10(c) reads as follows:

> (c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

In the case at bar, the Defendant followed the rule, but contends that it did not provide him with a sufficient record on appeal from which he could argue many of his issues, and, thus, that the application of the rule denied him due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

The Tenth Circuit Court of Appeals did not delineate any general guidelines that could be used to determine that the Defendant's claim was without merit nor are there any constitutional guidelines previously set down by the Supreme Court to determine this specific issue. Therefore, the Supreme Court should issue a writ of certiorari in this case.

In the case of *Draper v. Washington*, 372 U.S. 487 (1963), the Supreme Court held that transcripts are not always necessary and that alternate methods may be used at times if those methods place before the appellate court an equivalent report of the happenings upon which the appeal is based. *Draper*, at 495. Although *Draper* dealt with a state's procedure for determining when an indigent defendant must be given a free transcript, it would appear that this same rule would apply to federal courts and would be the basis for holding that F.R.A.P., Rule 10(c) is constitutional on its face.

This Court held in *Draper* that with regard to certain issues raised by the defendants, the trial court's ruling that these issues were frivolous was insufficient; in order for the appellate court properly to consider these issues, it had to have before it a transcript of portions of the trial relevant to these points. *Draper*, at 499-500. Although alternate methods of reporting may be permissible at times, they were insufficient in the *Draper* case to determine whether or not the state had established a proper foundation for the introduction of a gun and coat and were insufficient to determine the defendants' appeal issues relating to identification and perjury. *Draper*, at 496-497. The Supreme Court stated that without a transcript of these portions of the trial, the defendants were denied due process of law. *Draper*, at 499.

The Defendant argues that the application of F.R.A.P., Rule 10(c) in the case at bar has placed him in a position similar to the position of the defendants in *Draper*. Just as the alternate method used by the state courts in *Draper* was insufficient to protect those defendants' constitutional rights, the application of F.R.A.P., Rule 10(c) in this case has been insufficient to protect this Defendant's constitutional right to due process of law.

Without a transcript and with no mention in the Statements of Evidence of the answers to the voir dire questions, with no jury instructions and with no record relating to the trial court's rulings on instructions and admissability of evidence regarding the Defendant's religion and religious beliefs, it has been impossible for the Defendant to present, demonstrate or argue the following issues which were raised by him before, during and after trial, well in advance of any suggestion that the transcript would be unavailable: (a) whether a fair jury was chosen to sit in this trial or whether the jury was prejudiced by pre-trial publicity; (b) whether a fair jury was chosen to sit in this trial or whether the jury was prejudiced by prosecutorial musconduct; (c) whether the voir dire questioning was sufficient to sit a fair jury in this trial or whether the trial court should have permitted defense counsel to ask questions on voir dire; (d) whether the trial court erred when it refused to permit testimony about the Defendant's religion, religious beliefs and how these demonstrated the Defendant's good faith belief that he had a right to act as he did; and (e) whether the trial court erred when it denied the Defendant's orally presented jury instructions.

Neither the trial court nor the Tenth Circuit Court of Appeals made any specific findings that the record as it was transmitted on appeal was a sufficient record upon which the Defendant could base and argue his specific appeal issues. The trial court honestly admitted that it had such an insufficient recollection of the trial that it could make no comments about the trial. The Court of Appeals then discussed the missing transcript by denying the Defendant's claim without any reference to the specific issues raised by the Defendant.

The Court of Appeals first stated that *Draper* and *Coppedge v. United States*, 369 U.S. 438 (1962) did not apply to the case at bar. (Op. 6-8). It then stated that it was not impressed, "with counsel's contention that he is unable to recall possible trial errors." (Op. 8). The Court of Appeals misunderstood the Defendant's position in this matter: the Defendant remembered many of the trial errors and thus listed twenty-three of them in his Docketing Statement, but without a transcript of the missing portions of the trial, he cannot demonstrate these errors.

The Court of Appeals then stated that it was the burden of the Defendant to establish that he had been prejudiced by the lack of a transcript. The Defendant had made claims before trial, claims during trial and claims after trial that he had been prejudiced by the trial proceeding. The fact that he cannot now demonstrate these claims which were all made long before there was any suggestion that the transcript would be unavailable should in itself demonstrate that the Defendant has been prejudiced by the lack of a transcript. If the Court of Appeals by its opinion is requiring the Defendant to give it specific demonstrations of prejudice, it is placing the Defendant in an impossible position: according to this reasoning, the Defendant must have a transcript of the proceedings in order to demonstrate that the lack of a transcript has prejudiced him. This is a position analogous to the untenable and unconstitutional position in which many indigent defendants were placed when trying to obtain free transcripts: they were denied free transcripts since their appeals issues were frivolous and only the transcripts could demonstrate that their appeal issues were not frivolous. *Draper v. Washington, supra, Coppedge v. United States, supra.* Just as the indigents' untenable position was held to deny them due process of law, the Defendant's position should be held to deny him due process of law in this case.

The Court of Appeals then went on to state that there was a "reasonably complete" transcript (Op. 9) and that "failure to fill in the tax return" cases "are very difficult to defend." (Op. 9). The Court of Appeals appeared to imply that since cases such as this one are difficult to defend, there is less need for a

complete transcript. The Defendant claims that the nature of the case has no relevance to due process of law. Even the most difficult cases to defend, such as in *Miranda v. Arizona*, 384 U.S. 436 (1966), require that the defendant be given due process of law. Furthermore, the issues on appeal for which a transcript is most needed are not issues related to the failure to fill in a tax return; they are more fundamental issues dealing with defendants' rights to fair trials.

In addressing the issue of the lack of a transcript, the Court of Appeals in the case at bar never addressed the issue of whether or not the record was sufficient to accord the Defendant a meaningful appeal, except when it stated, " . . . the transcript is reasonably complete, and so it is not a *per se* case of due process violation." (Op. 9). The Court of Appeals basically denied the Defendant's contention without addressing the issue and certainly without setting up any constitutional guidelines by which to determine the constitutionality of F.R.A.P., Rule 10(c).

The Defendant asserts that the Supreme Court should issue writ of certiorari in this case in order to determine whether or not the Tenth Circuit Court of Appeals is in conflict with the Supreme Court's ruling in *Draper v. Washington, supra*, and in order to hand down specific constitutional guidelines to determine the constitutionality of the application of F.R.A.P., Rule 10(c).

B. THE SUPREME COURT SHOULD CLARIFY THE CONFUSION IN THE CIRCUITS CONCERNING SCIENTER, KNOWLEDGE, INTENT, AND WILLFULNESS THAT EXISTS IN CONSTRUING THE CULPABILITY NEEDED TO CONVICT A CITIZEN FOR FAILING TO SUPPLY TAX INFORMATION CONTRARY TO 26 U.S.C. §7203.

In *U.S. v. Pomponio*, 429 U.S. 10, 97 S.Ct. 22 (1976), this court conntinued the specific intent guidelines set forth in *U.S. v. Murdock*, 290 U.S. 389, 45 S. Ct. 223 (1933) and *Bishop v. U.S.*, 412 U.S. 346 (1972) in construing the requisite intent needed to prove a criminal violation under 26 U.S.C. §7203.

In *Pomponio*, this court made it clear that the requisite intent was a specific and not a general intent. The jury was instructed that the government must prove that the defendants " . . . purposely intended to violate a known legal duty." This concept has been followed in the Third Circuit in *U.S. v. Vitiello*, 363 F.2d 240 (C.A. 3rd, 1966), the Eighth Circuit in *U.S. v. Pohlman*, 522 F.2d 974 (C.A. 8th, 1975), and Seventh Circuit in *U.S. v. McCorckle*, 511 F.2d 482 (C.A. 7th, 1975). However, the Tenth Circuit has construed the intent requirement as if it were general intent. *U.S. v. Dillon*, 566 F.2d 702 (C.A. 10th, 1977).

In *Dillon*, the defendant, apparently relying on the *Bishop* concept that the government must show bad motive or evil purpose, assumed that the converse would negate the intent element. He therefore argued that he made a good faith attempt to test the validity of the tax laws. In its attempt to cut off testimony concerning beliefs about the constitutionality of tax laws, the court affirmed a test of general intent contrary to *Bishop* and *Pomponio, supra*. The only element of intent in *Dillon* is that the defendant acted intentionally as distinguished from accidentally. This is contrary to the holding of *Bishop*. Hence, when the trial court gave an instruction following the dictates of *Dillon, supra*, it contravened this court's holding in *Bishop* and *Pomponio, supra*.

In the case at bar, the trial court also excluded evidence concerning the defendant's religious beliefs and testimony regarding his beliefs in rights guaranteed him under other amendments to the U.S. Constitution. The jury was instructed that the First, Fourth, Sixth, Tenth, and Fourteenth Amendments were not a defense. However, the court did not allow, in its instruction, the jury to consider state of mind and scienter. Even though reliance on these amendments is not a defense, the defendant's state of mind is relevant in a criminal case to

show intent. In applying *Dillon*, the court made the crime an offense of strict liability, which conflicts with the circuits' and this court's rulings.

C. A CITIZEN SHOULD BE ENTITLED TO RELY UPON HIS RIGHTS UNDER THE 5TH AMENDMENT WITHOUT HAVING TO BE OR PROFESS TO BE A CRIMINAL.

The trial court ruled that in order to rely upon his rights under the 5th Amendment in this case, the Defendant must face some possibility of prosecution by having committed a criminal act. The trial court ruled that the petitioner had to have a good faith reliance on the 5th Amendment to be afforded due protection and to be able to rely on the protection when filing his tax return.

The Defendant enumerated and appended his reasons for not providing information on his 1040 return and did not make a blanket 5th Amendment refusal without explanation.

The trial court determined that his reliance on the U.S. Constitution was not in good faith and therefore not a defense because the Defendant had not committed a crime and therefore would not have incriminated himself. He ruled that the essence of the amendment was a privilege against self-incrimination and if there could be no incrimination, there could be no privilege.

Petitioner disagrees with this concept. The Fifth Amendment to the Constitution of the United States of America confers a right, not a privilege. Secondly, it is a right afforded all citizens, not just wrongdoers or criminals. If, as the trial court held, one must have been a wrongdoer and face possible prosecution to rely on the rights guaranteed by the 5th Amendment, then only criminals are so protected. This was not the intent of the draftsmen.

It has been held that the right must be asserted [*Garner v. U.S.*, 424 U.S. 648 (1976)] unless a person is in custody and

about to be interrogated [*Miranda v. Arizona*, 384 U.S. 436 (1966)]. A clear reading of the Amendment shows that the essence is the compulsion. It states, in part, that "No person shall . . . be compelled in any criminal case to be a witness against himself . . . " 26 U.S.C. §7206, provides for a penalty of perjury for willfully subscribing a false return. The requirement compels data from the citizen and imposes sanctions for not supplying this data. The term "in any criminal case" has included IRS instituted proceedings vs. Goldsmith, 272 F. Supp. 924 (D.C. N.Y.), *U.S. v. Malnick*, 348 F. Supp. 1723 (D.C. Fla).

The Tenth Circuit has also ruled that assertion of the 5th Amendment is not a defense as a matter of law. *U.S. v. Irwin*, 561 F.2d 198 (10th Cir. 1977). However, this is in conflict with the intent of *U.S. v. Sullivan*, 274 U.S. 259 (1927) and *Garner v. U.S.*, 424 U.S. 648 (1976) and causes traps for the unwary similar to the situation in *Pauldine v. U.S.*, 500 F.2d 1369.

If tax returns were totally privileged and not secured by govermental agencies, the type of problem would not exist. Since courts have ruled that the right must be exerted or lost, a good citizen who wants to preserve his right must assert it. By holding that the citizen must be a wrongdoer to do this without being prosecuted, has the effect of amending the 5th Amendment, applying it only to criminals.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DENNIS L. BLEWITT
CLIFFORD J. BARNARD
Attorneys for
Defendant-Petitioner

APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1645

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DON H. PERRY,

Defendant-Appellant.

—— F2d ——

Appeal from the United States District Court for the District of Colorado (D.C. No. 78-CR-87)

Carole C. Dominguin, Assistant U.S. Attorney (Joseph Dolan, United States Attorney, on the brief), for Plaintiff-Appellee.

Dennis L. Blewitt (Clifford J. Barnard, on the brief), for Defendant-Appellant.

Heard before DOYLE, BREITENSTEIN and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

This criminal prosecution arises pursuant to 26 U.S.C. § 7203, which statute prohibits persons required to pay tax and to make a return from willfully failing to supply information required by law or regulations. Defendant is charged with failing to furnish information required by law in three separate counts.

Count I alleges that during the year 1974, the defendant received gross income of an amount which required him to file a return and furnish information, and that he willfully and knowingly failed to supply it to the District Director of Internal Revenue on his 1040 return, contrary to 26 U.S.C. § 7203. Count II is in identically the same form except that it pertains to the year 1975 and again alleges the failure to supply information in his 1040 return. Count III has to do with the calendar year 1976. It also charges the willful and knowing failure to supply information on Form 1040.

Conviction was had on all three counts, and the defendant appeals from the judgment which provided a sentence of one year in prison on each count, the sentences to run concurrently. Sentence on Count II was suspended on the condition that the defendant perform 320 hours of volunteer service with either the National Park Service or the U.S. Forest Service.

The defendant was shown by the evidence to be a person of good moral character and was active in his church. He offered in his defense that he had studied the Constitution, the Bill of Rights, and a work called The Rights of Taxpayers. He attended seminars which dealt with tax laws, and it also appeared that he was and is a Certified Public Accountant and had contact with the Internal Revenue Service in his profession as a C.P.A. He was aware of the procedures for challenges relating to the filing of tax returns. He said that in preparing the tax returns in question he had relied on Garner v. United States, 424 U.S. 648 (1976), and United States v. Sullivan, 274 U.S. 259 (1927). He claimed a Fifth Amendment right to freedom from self-incrimination in his 1974, 1975 and 1976 tax returns. He claimed this right, he said, after he had been told that he had such right

by Mr. Bachman, presumably the agent. He further testified that he had noted on his tax returns objections to specific questions on grounds that the answers were violative of the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Sixteenth Amendments.

As an accountant, he said that he was familiar with the minimum level of income that would require the filing of an income form. He was, of course, familiar with the intricacies of income tax reporting.

He filed many appendices to his tax returns. These were obtained from packets which he had accumulated from other sources. In October 1975, defendant said that he attended a tax strike convention and was one of the arrangers of that convention. He indicated that he had received refunds for income tax returns filed for the taxable years 1968-1972. Thus, he was not strange to the matter of filing returns and to the legal necessity for filing them.

An examination of the docketing statement filed in this case reveals that the defendant set forth a total of 23 trial court errors. Most of his complaints about the trial had to do with the refusal of the trial court to instruct the jury regarding such things as his good faith understanding of the requirements of the law or to his good faith belief that he had filed sufficient return, although he had not, and as this good faith affected the element of willfulness, and the refusal of the court to instruct the jury that willfulness required the doing of an act with evil motive to disobey or disregard the law. A further instruction which was not given which he said ought to have been was to the effect that the I.R.S. could not reject a return as improper or incomplete until it had given the taxpayer a hearing to determine whether the answer to the questions really would incriminate him. Another deficiency which he claimed was in the instructions. It was the failure of the court to instruct the jury that defendant had a good faith privilege under the Fifth Amendment which could be asserted on his return; that he could not be convicted for an erroneous claim of privilege asserted in good faith; that the court should have instructed the jury in the phrases submit-

ted by the defendant regarding religious beliefs, e.g. that the Constitution was a sacred document and that he was following such a belief. He asserts the error of the trial court in instructing the jury that the First Amendment right to religious freedom was not a defense in this case. Also asserted was the proposition that only basic disclosures such as name and address had to be given on an income tax return and that the Fifth Amendment privilege against self-incrimination could be claimed in all other questions.

The above description of alleged errors which are advanced on appeal are set forth above so as to show in a general way the nature of the appeal. The appellant's purported returns were of the same character as the contentions in that they followed the tax resistance philosophy. The returns, one of which is appended hereto, illustrates this. It seeks to make a formal filing, but at the same time to avoid furnishing the vital information which the income tax law requires.

Counsel has not argued all of the 23 points listed and we find it unnecessary to discuss all of the points. Furthermore, we do not discuss all of the points that are argued in the brief. These latter are not necessarily the ones which are advanced in the docketing statement. We limit our discussion to those matters which pose a question which is not untenable on its face.

I.

The first point is that of lack of a complete transcript of the evidence. This is due to the disappearance of some of the notes of the reporter. The notes which the reporter had, those which had not disappeared, were transcribed. The trial court allowed the appellant to fully utilize the Federal Rules of Appellate Procedure, Rule 10 (c), which makes provision for a situation such as the instant one. The rule declares that if no report of the evidence of a trial was made or if a transcript was unavailable, that the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. This statement is then served on the appellee, who has time to make objections or propose amendments. Thereupon,

the statement and any objections or proposed amendments are to be submitted to the court for settlement and approval and, if settled and approved, can be included by the clerk in the record on appeal.

The government did not object to the three versions of the missing transcript which were prepared independently by the two counsel for the defendant and by the defendant himself. The court submitted all three to us, and these are reported in Supplemental Volume I of the record on appeal.

It would seem that the gap that has been complained about is, for the most part, that which contains the voir dire examination of the jury, the opening statements of counsel, and other of the proceedings during the early part of the trial. Missing also are some of the concluding parts of the evidence and proceedings. However, the testimony that is transcribed, together with the numerous exhibits which are offered and the summaries that were submitted, provide a fairly complete picture of the prosecution's evidence, the defendant's evidence and the nature and general character of the case, and so the transcript is not as incomplete as counsel would have us believe. The defense is, for the most part, transcribed — the defendant's testimony and the testimony of associates who expressed their high regard for him and for his reputation in the community as a good citizen and honest man.

Defendant-appellant relies on the Supreme Court's decisions in *Draper v. Washington*, 372 U.S. 487 (1963), and Coppedge v. United States, 369 U.S. 438 (1962). *Coppedge* is a case which involves an indigent who sought to appeal *in forma pauperis*. The court of appeals denied the application to proceed *in forma pauperis* and did so without opinion. The Supreme Court ruled that it was error to deny the application and that he was entitled to counsel and to a free transcript. The basic issue in the case was whether the lower courts were justified in denying the right to prosecute the appeal based upon the insubstantiality of the issues. Thus, *Coppedge* is not direct authority in support of the

case at bar involving as it does the question whether there is a deprivation of Fifth Amendment due process growing out of the loss of parts of the transcript.

Draper v. Washington, supra, was much more similar to the *Coppedge* case than to our case. Here again, the issue was whether the defendants were entitled to a free transcript. The trial judge ruled that each of the contentions of the appellant were not only lacking in merit, but that they were patently frivolous and that guilt had been established by overwhelming evidence. This ruling was affirmed by the supreme court of the State of Washington. The Supreme Court held that the record before the trial court and the state supreme court was insufficient and that the refusal to allow defendants to have a stenographic record constituted a violation of the due process clause of the Fourteenth Amendment. The case was reversed on the ground that the trial court's determination that the appeal was frivolous constituted an inadequate substitute for a full appellate review such as that which was available to nonindigents in the State of Washington where the effect of the court's finding was to deprive the accused of a full review of the trial.

Draper, like *Coppedge*, does not furnish direct support to the defendant-appellant's contention. It is arguably supportive in a minor way in that it emphasizes the importance to appellate review of a record including the transcript.

In denying relief in this case we do not deny the contribution to the appeal of the clerk's record and the transcript of the testimony. At the same time, the transcript is not indispensable. The main reason for this is that the appellate process is concerned with questions of law. It does not weigh the facts, even though it is frequently called on to consider them in relationship to the legal issues presented. The defendant says in effect that failure to provide a verbatim transcript deprives him of the right to address the trial issues which counsel are unable to remember, or, as applied to this case, it violates his right under the due process clause. A further argument is that, in the alternative, he is entitled to an express ruling by the district court as to the necessity of a trial transcript in relationship to the violation

of the Fifth Amendment. He requests a remand for this purpose. We must deny this latter request along with appellant's other demands.

As to the first point raised, we are not impressed with counsel's contention that he is unable to recall possible trial errors. Our reaction to that is that he should have the burden of establishing that he has been prejudiced. He should not ask us to presume this.

As to the second point, we have already noted that the transcript is reasonably complete, and so it is not a per se case of due process violation. It should be added that this kind of case (failure to fill in the tax return) is very difficult to defend. After all, the income tax has itself been validated by vote of the states. The Sixteenth Amendment was adopted following a ruling by the Supreme Court that an Act of Congress without aid of a specific constitutional amendment was unconstitutional.[1] So, therefore, there is little room for defending against a statute authorizing the Internal Revenue Service to compel submission of a return containing relevant information. Self-incrimination does have a place here, but it does not operate in the abstract. It must be directed to specific questions, and it must be shown that they do in truth call for information which would incriminate the accused.

As to the contention that it was necessary for the district court to furnish a finding as to violation of the Fifth Amend-

---

1. The Amendment provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

This Amendment passed the Congress in 1909, and ratification by the legislatures of the several states was completed on February 3, 1913. Thus, to contend that the income tax is unconstitutional is to say that the Constitution itself is unconstitutional.

ment, we must reject this also. We have previously considered this issue and resolved it against the defendant, and we see no reason for reversing that ruling.

Draper is cited under this heading as authority. It is said that the Supreme Court ruled in that case that the Washington Supreme Court could not determine whether the indigents had the right of a transcript based on the record before it. As appears above, we are not subject to this handicap.

II.

The next argument advanced by the defendant-appellant is that the voir dire questioning by the trial court was inadequate and thus it did not serve to establish that the jurors summoned were fair and impartial.

In denying the motion to allow defense counsel to voir dire the prospective jurors, the trial court's written ruling is as follows:

> [It is] ORDERED that the motion is denied and counsel for the defendant should submit in writing no later than 8:30 A.M. on May 30, 1978, such specific questions as counsel reasonably can anticipate are needed for the selection of a fair and impartial jury for the trial of this case.

The essence of the argument is an attack upon the system which allows the trial court to conduct the voir dire examination. But, this court has long held that the conduct of the voir dire examination by the judge rather than counsel is not an abuse of discretion. *See United States v. Grismore*, 546 F.2d 844 (10th Cir. 1976), and *United States v. Addington*, 471 F.2d 560 (10th Cir. 1973).

Rule 24(a) of the Federal Rules of Criminal Procedure provides that the court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. It further provides that if the court conducts the examination, it shall permit the defendant or his attorney and the attorney for

the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper. Thus, the rule gives the trial court a wide discretion in carrying out this highly important examination. No specific contention is made that the trial court failed to discharge its duty. It is not, for example, said that the court refused to submit questions submitted by the defendant or that its examination was otherwise incomplete or erroneous.

In *Grismore, supra,* this court pointed out that it was the practice in the Tenth Circuit for the court to ask the voir dire questions. It was there said: "It is discretionary with the trial judge to permit the attorneys to supplement the questioning, but the court has discretion in deciding what questions are to be asked. The court's discretion will not be disturbed." 546 F.2d at 848.

Since the defendant has not advanced a specific objection to the voir dire questioning in the instant case, we must conclude that there was no failure on the part of the trial court to carry out the requirements of the law. Again, we cannot presume that the counsel were prejudiced in their exercise of peremptory challenges.

III.

The defendant complains about a news release of the district attorney's office which stated that defendant had been charged with certain offenses and implied that the defendant was guilty of these offenses. The defendant filed a motion to dismiss, a motion for a continuance, and a motion for change of venue. All motions pointed to the publicity. It is to be noted that the court did grant a continuance from May 8 to May 30, saying that the ends of justice, by ordering the continuance, would be best served and would outweigh the public interest in giving the

defendant a speedy trial. The news release which is apparently relied on would appear to have been a description of the charge. The text of this is as follows:

> On March 9, 1978, the United States Attorney's office filed an information charging DON H. PERRY of Lakewood, Colorado with wilfully failing to supply information on his Form 1040 individual income tax returns for the years 1974, 1975, and 1976.
>
> According to the information, PERRY had received gross income of approximately $44,325.36 for the years involved.
>
> If found guilty of these charges, PERRY could face up to one year in prison and a $10,000 fine or both on each count contained in the information.

Another of these, which is contained in the record, is to the same effect:

> The U.S. Attorney's office today announced the filing of charges against eight Colorado residents for submitting fraudulent income tax withholding certificates (Forms W-4 and W-4E) to their employers. Named in the informations filed with the U. S. District Court were RUSSELL C. HUDLER, KENNETH W. OLSON, STEPHEN L. PEISTER, and PATRICK C. RYAN.
>
> Possible penalties upon conviction include fines of up to $500 and imprisonment for up to one year or both.

The motion to dismiss due to prosecutorial misconduct was filed in response to the fact that the filing of these charges was publicized. We are unable to perceive either misconduct or error in the refusal of the trial court to find such misconduct.

The trial court issued a ruling in writing in connection with its denial of the motion to dismiss in which it said that the motion did not state good cause.

Our conclusion also is that there is no specific showing of the existence of good cause in connection with the assertion that the trial court erred in denying the motion to dismiss, alleging prosecutorial misconduct. Our ruling is the same as to the contention that the trial court should have granted a change of

venue predicated on prosecutorial misconduct. Just because cases were filed does not give rise to the necessity for change of venue.

We have considered the other contentions which are raised by the defendant and are of the opinion that they are wholly lacking in merit and that the arguments must be rejected.

The judgment of the district court should be and the same is hereby affirmed.

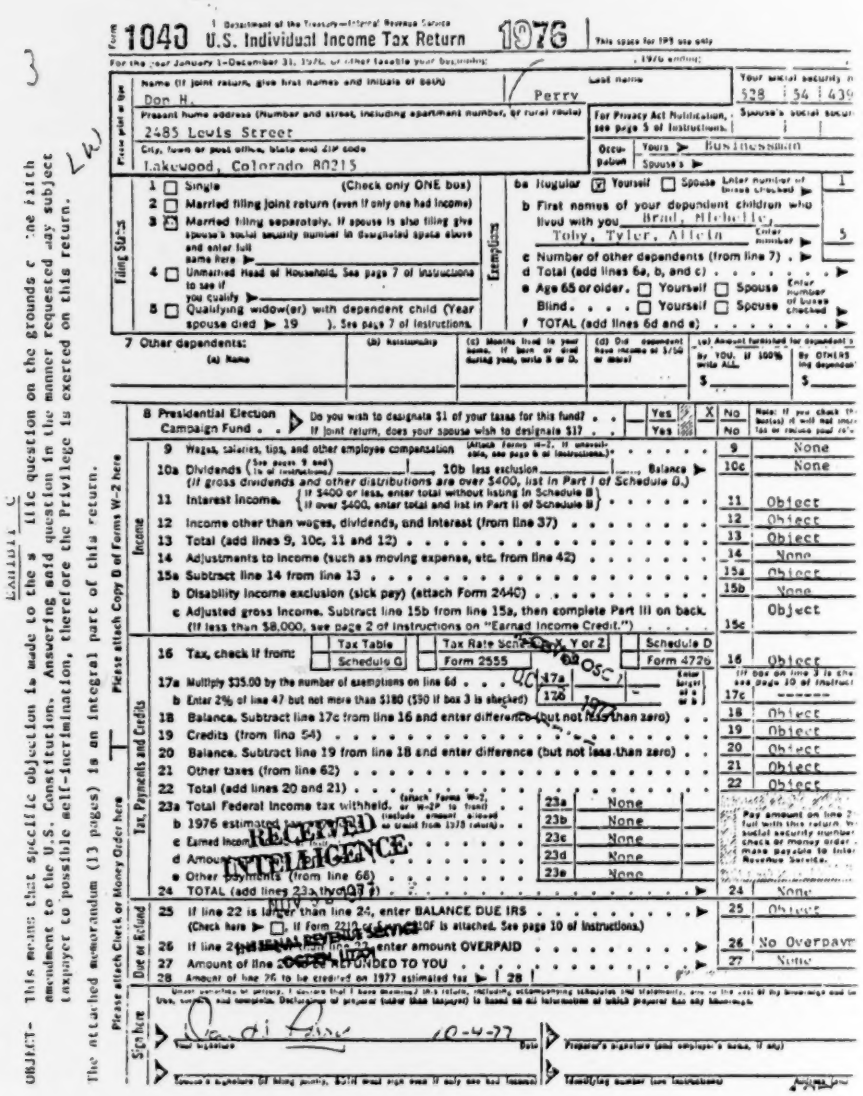


Exhibit 3

SUBJECT- This memo that specific objection is made to the [illegible] question on the grounds of one fifth amendment to the U.S. Constitution. Answering said question in the manner requested may subject taxpayer to possible self-incrimination, therefore the Privilege is exerted on this return.

The attached memorandum (13 pages) is an integral part of this return.

Please attach Copy B of Forms W-2 here

Please attach Check or Money Order here

Form 1040 U.S. Individual Income Tax Return 1976

Department of the Treasury—Internal Revenue Service

This space for IRS use only

For the year January 1–December 31, 1976, or other taxable year beginning , 1976 ending ,

Name (If joint return, give first names and initials of both) Don H. Last name Perry Your social security no. 528 54 439

Present home address (Number and street, including apartment number, or rural route) 2485 Lewis Street

For Privacy Act Notification, see page 5 of Instructions. Spouse's social security no.

City, town or post office, state and ZIP code Lakewood, Colorado 80215

Occupation Yours ▶ Businessman Spouse's ▶

Filing Status

1 ☐ Single (Check only ONE box)

2 ☐ Married filing joint return (even if only one had income)

3 ☒ Married filing separately. If spouse is also filing give spouse's social security number in designated space above and enter full name here ▶

4 ☐ Unmarried Head of Household. See page 7 of Instructions to see if you qualify ▶

5 ☐ Qualifying widow(er) with dependent child (Year spouse died ▶ 19). See page 7 of Instructions.

Exemptions

6a Regular ☒ Yourself ☐ Spouse Enter number of boxes checked ▶ 1

b First names of your dependent children who lived with you Brad, Michelle, Toby, Tyler, Allen Enter number ▶ 5

c Number of other dependents (from line 7) ▶

d Total (add lines 6a, b, and c) ▶

e Age 65 or older. ☐ Yourself ☐ Spouse Blind. ☐ Yourself ☐ Spouse Enter number of boxes checked ▶

f TOTAL (add lines 6d and e) ▶

7 Other dependents:

(a) Name	(b) Relationship	(c) Months lived in your home. If born or died during year, write B or D.	(d) Did dependent have income of $750 or more?	(e) Amount furnished for dependent's support: By YOU. If 100% write ALL.	By OTHERS (any dependents)
				$	$

8 Presidential Election Campaign Fund ▶ Do you wish to designate $1 of your taxes for this fund? Yes X No

If joint return, does your spouse wish to designate $1? Yes No

Income

9	Wages, salaries, tips, and other employee compensation (Attach Forms W-2. If unavailable, see page 6 of Instructions.)	9	None
10a	Dividends (Less exclusion of ____ See page 9 and 10a of Instructions) 10b less exclusion ____ Balance ▶ (If gross dividends and other distributions are over $400, list in Part I of Schedule B.)	10c	None
11	Interest income. (If $400 or less, enter total without listing in Schedule B. If over $400, enter total and list in Part II of Schedule B.)	11	Object
12	Income other than wages, dividends, and interest (from line 37)	12	Object
13	Total (add lines 9, 10c, 11 and 12)	13	Object
14	Adjustments to income (such as moving expense, etc. from line 42)	14	None
15a	Subtract line 14 from line 13	15a	Object
b	Disability income exclusion (sick pay) (attach Form 2440)	15b	None
c	Adjusted gross income. Subtract line 15b from line 15a, then complete Part III on back. (If less than $8,000, see page 2 of Instructions on "Earned Income Credit.")	15c	Object

Tax, Payments and Credits

16	Tax, check if from: ☐ Tax Table ☐ Tax Rate Schedule X, Y or Z ☐ Schedule D ☐ Schedule G ☐ Form 2555 ☐ Form 4726	16	Object
17a	Multiply $35.00 by the number of exemptions on line 6d	17a	126
b	Enter 2% of line 47 but not more than $180 ($90 if box 3 is checked)	17b	
17c	If box on line 3 is checked, see page 10 of Instructions	17c	
18	Balance. Subtract line 17c from line 16 and enter difference (but not less than zero)	18	Object
19	Credits (from line 54)	19	Object
20	Balance. Subtract line 19 from line 18 and enter difference (but not less than zero)	20	Object
21	Other taxes (from line 62)	21	Object
22	Total (add lines 20 and 21)	22	Object
23a	Total Federal income tax withheld. (Attach Forms W-2. If W-2P is issued, include amount allowed as credit from 1975 return.)	23a	None
b	1976 estimated tax payments	23b	None
c	Earned income credit (see page 2 of Instructions)	23c	None
d	Amount paid with Form 4868	23d	None
e	Other payments (from line 66)	23e	None
24	TOTAL (add lines 23a through 23e)	24	None
25	If line 22 is larger than line 24, enter BALANCE DUE IRS (Check here ▶ ☐ If Form 2210 or 2210F is attached. See page 10 of Instructions.)	25	Object
26	If line 24 is larger than line 22, enter amount OVERPAID	26	No Overpayment
27	Amount of line 26 to be REFUNDED TO YOU	27	None
28	Amount of line 26 to be credited on 1977 estimated tax ▶ 28		

Pay amount on line 25 in full with this return. Write social security number, check or money order and make payable to Internal Revenue Service.

Due or Refund

Sign here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature Don H. Perry Date 10-4-77

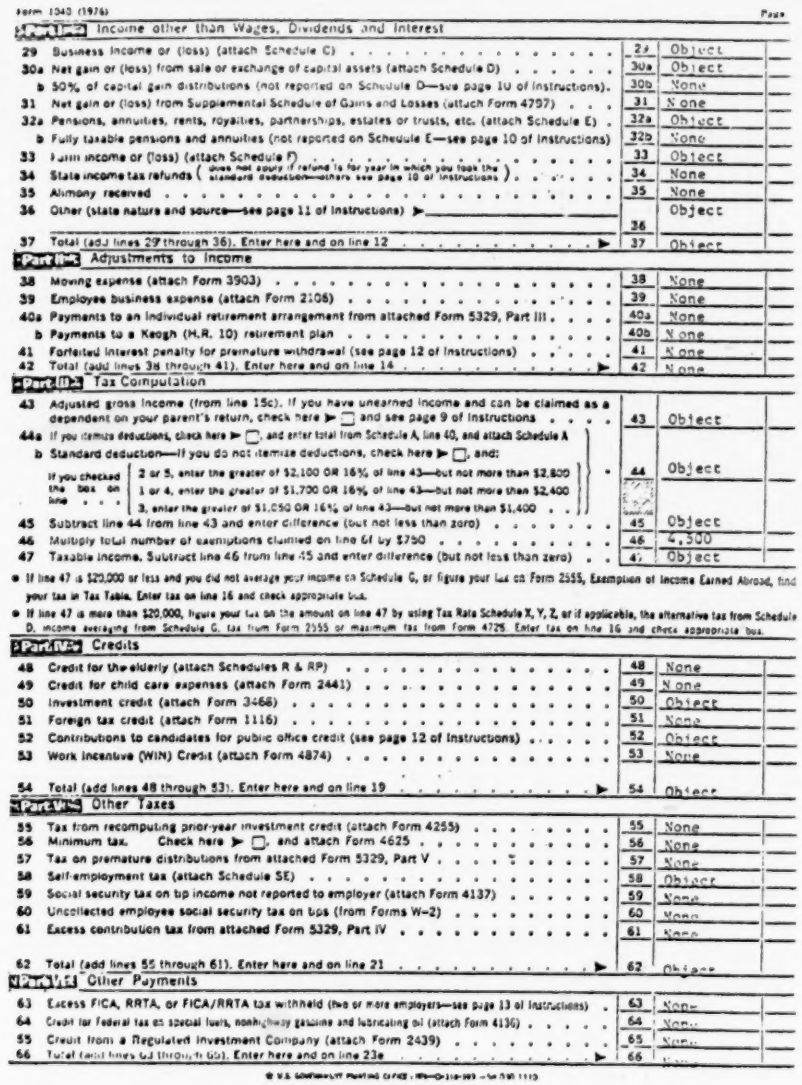
Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

Preparer's signature (and employer's name, if any)

Preparer's social security number (see instructions)

Address (number and street)

RECEIVED
INTELLIGENCE
NOV 3 1977
INTERNAL REVENUE SERVICE



Form 1040 (1976) Page

Part I Income other than Wages, Dividends and Interest

29	Business income or (loss) (attach Schedule C)	29	Object	
30a	Net gain or (loss) from sale or exchange of capital assets (attach Schedule D)	30a	Object	
b	50% of capital gain distributions (not reported on Schedule D—see page 10 of Instructions)	30b	None	
31	Net gain or (loss) from Supplemental Schedule of Gains and Losses (attach Form 4797)	31	None	
32a	Pensions, annuities, rents, royalties, partnerships, estates or trusts, etc. (attach Schedule E)	32a	Object	
b	Fully taxable pensions and annuities (not reported on Schedule E—see page 10 of Instructions)	32b	None	
33	Farm income or (loss) (attach Schedule F)	33	Object	
34	State income tax refunds (give not apply if refund is for year in which you took the standard deduction—others see page 10 of Instructions)	34	None	
35	Alimony received	35	None	
36	Other (state nature and source—see page 11 of Instructions) ➤	36	Object	
37	Total (add lines 29 through 36). Enter here and on line 12 ➤	37	Object	

Part II Adjustments to Income

38	Moving expense (attach Form 3903)	38	None	
39	Employee business expense (attach Form 2106)	39	None	
40a	Payments to an individual retirement arrangement from attached Form 5329, Part III	40a	None	
b	Payments to a Keogh (H.R. 10) retirement plan	40b	None	
41	Forfeited interest penalty for premature withdrawal (see page 12 of Instructions)	41	None	
42	Total (add lines 38 through 41). Enter here and on line 14 ➤	42	None	

Part III Tax Computation

43	Adjusted gross income (from line 15c). If you have unearned income and can be claimed as a dependent on your parent's return, check here ➤ ☐ and see page 9 of Instructions	43	Object	
44a	If you itemize deductions, check here ➤ ☐, and enter total from Schedule A, line 40, and attach Schedule A			
b	Standard deduction—If you do not itemize deductions, check here ➤ ☐, and:			
	If you checked the box on line ... 2 or 5, enter the greater of $2,100 OR 16% of line 43—but not more than $2,800	44	Object	
	1 or 4, enter the greater of $1,700 OR 16% of line 43—but not more than $2,400			
	3, enter the greater of $1,050 OR 16% of line 43—but not more than $1,400			
45	Subtract line 44 from line 43 and enter difference (but not less than zero)	45	Object	
46	Multiply total number of exemptions claimed on line 6f by $750	46	4,300	
47	Taxable income. Subtract line 46 from line 45 and enter difference (but not less than zero)	47	Object	

- If line 47 is $20,000 or less and you did not average your income on Schedule G, or figure your tax on Form 2555, Exemption of Income Earned Abroad, find your tax in Tax Table. Enter tax on line 16 and check appropriate box.
- If line 47 is more than $20,000, figure your tax on the amount on line 47 by using Tax Rate Schedule X, Y, Z, or if applicable, the alternative tax from Schedule D, income averaging from Schedule G, tax from Form 2555 or maximum tax from Form 4726. Enter tax on line 16 and check appropriate box.

Part IV Credits

48	Credit for the elderly (attach Schedules R & RP)	48	None	
49	Credit for child care expenses (attach Form 2441)	49	None	
50	Investment credit (attach Form 3468)	50	Object	
51	Foreign tax credit (attach Form 1116)	51	None	
52	Contributions to candidates for public office credit (see page 12 of Instructions)	52	Object	
53	Work Incentive (WIN) Credit (attach Form 4874)	53	None	
54	Total (add lines 48 through 53). Enter here and on line 19 ➤	54	Object	

Part V Other Taxes

55	Tax from recomputing prior-year investment credit (attach Form 4255)	55	None	
56	Minimum tax. Check here ➤ ☐, and attach Form 4625	56	None	
57	Tax on premature distributions from attached Form 5329, Part V	57	None	
58	Self-employment tax (attach Schedule SE)	58	Object	
59	Social security tax on tip income not reported to employer (attach Form 4137)	59	None	
60	Uncollected employee social security tax on tips (from Forms W-2)	60	None	
61	Excess contribution tax from attached Form 5329, Part IV	61	None	
62	Total (add lines 55 through 61). Enter here and on line 21 ➤	62	Object	

Part VI Other Payments

63	Excess FICA, RRTA, or FICA/RRTA tax withheld (two or more employers—see page 13 of Instructions)	63	None	
64	Credit for Federal tax on special fuels, nonhighway gasoline and lubricating oil (attach Form 4136)	64	None	
65	Credit from a Regulated Investment Company (attach Form 2439)	65	None	
66	Total (add lines 63 through 65). Enter here and on line 23e ➤	66	None	

APPENDIX B

Constitution of the United States

Amendment [I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the ac-

cusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

26 USC §7203

TITLE 26-PROCEDURE AND ADMINISTRATION

7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction therof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(Aug. 16, 1954, c. 736, 78A Stat. 851).

Rule 10(c) F.R.A.P.

(c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.